

HEALTH LAW, Fall 1999

Exam No. _____

FINAL EXAMINATION

INSTRUCTIONS: READ AT ONCE

1. **When you pick up the exam, note the date and time below.** Write your exam number at the top of this page, and at the beginning of your answer to each question. You must hand in these questions with your answers, within 24 hours of the time you picked the exam up. Put the exam and your answers in the envelope on the bulletin board outside Room 312. You must also sign the certification below, detach it, put it in a separate sealed envelope labelled "Health Law," and turn it in with the exam. All exams must be in by Friday, Dec. 17, at 5:00 pm.

2. The exam has three parts. Grading will be weighted roughly as follows: Part I 30%; Part II 20%; Part III 50%. Answers to each part must begin on a separate page.

3. Your answers must be typed or printed out. Note the maximum space limit for each question. Answers to each part of the exam should begin on a separate page. Double-space and leave one-inch margins. Each page must be numbered, starting with p. 1 for each part of the exam.

4. **READ THIS.** The exam is open book, except as follows. (a) **You may not access any computerized database** (Westlaw, Lexis, Law-CD Rom, Internet databases, etc.). (b) You may not communicate (1) about the exam or its coverage with any other person, or (2) about any of the course topics with anyone having knowledge of the exam, from Saturday, Dec. 11, at 5:00 pm to Friday, Dec. 17, at 5:00 pm. This silence is the price you pay for your flexibility in the exam's timing.

----- (Detach here) -----

HONOR CODE CERTIFICATION

I certify that (1) I picked this exam up at _____ (time) on Dec. ____ (date), and I turned it in at _____ on Dec. ____; (2) I have not violated and will not violate paragraph 4 of these instructions, which I have carefully read; and (3) I have neither made nor caused to be made a copy of the exam.

_____ (your signature)

PART I: SHORT ANSWERS (30%).

Maximum limit: 150 words each

Please identify 12 of the following 13 phrases or concepts, explaining their meaning and significance to health law in no more than 150 words (except for # 4, in which your answer may not exceed 300 words).

1. “Appropriate medical screening examination”
2. Confidence intervals
3. Confidentiality of peer review proceedings
4. “Honest error in judgment” rule vs. “respectable minority” rule vs. “clinical innovation defense” (you may write up to 300 words on this one)
5. Intermediate sanctions
6. Moral hazard/free rider problem
7. No-cause termination: considerations and implications
8. Ostensible agency test
9. RB-RVS
10. “Remuneration” for purposes of the anti-kickback law
11. *Res ipsa* in medical malpractice cases
12. Risk adjustment
13. Upcoding

PART II. SHORT ESSAYS (20%).

Maximum limit: 750 words (3 typed pages) per question

1. Discuss the pros and cons of releasing health care quality information to the general public. Specify what types of information (if any) should be released, what types (if any) should be protected as confidential, and the reasons for your conclusions. Give illustrative examples as needed.

2. Was *George v. Jefferson Hospital Ass’n* (Handout # 7) correctly decided? If not, are any statutory reforms advisable, or do the direct action statutes take care of any problems?

PART III. ESSAY (50%).

Maximum limit: 2000 words (8 typed double-spaced pages)

Jerry Jackson is 60 years old, an hourly employee (custodial services) of Dean Witter, the brokerage firm. As part of its compensation package, Dean Witter offers its employees health benefits: a choice of either a standard fee-for-service policy, with a substantial deductible and copayments for medical and hospital services and drugs, or an HMO with a lower deductible and copayments. Jerry enrolled in the HMO: WholeCare, Inc.

Jerry's primary care physician in the WholeCare plan was Dr. Frank Francis. Dr. Francis was a 1992 medical school graduate who had completed his residency and then had failed his board certification exam in family practice. (An M.D. does not have to be board certified to practice medicine.) His insurer had settled two minor malpractice claims against him. When Jerry had signed up with the HMO, he had been randomly assigned to one of the pool of participating physicians, and had wound up with Dr. Francis. Jerry did not know that Dr. Francis had failed the board certification exam or had been sued for malpractice; he just figured Dr. Francis, as a recent medical graduate, must be up on the latest medical knowledge.

WholeCare did not employ Dr. Francis directly; rather, he belonged to the Central Arkansas Physicians' Group, an association of doctors who accepted capitated payments for patients enrolled in a variety of local managed care organizations, including WholeCare. Each year, 25% of the capitated payment amount was withheld by WholeCare, pending a review of a participating physician's referral patterns and a calculation of the monetary value of all additional services consumed by patients whom that doctor serves. If a doctor meets WholeCare's targets she receives the 25% withheld. If she fails, how much of the 25% she receives depends on how much health care her patients consume beyond WholeCare's aggregate ceiling. Failure brings with it close scrutiny of a doctor's practice with respect to WholeCare patients and can result in a doctor's being de-listed by WholeCare. As of 1998, 50% of all doctors who exceeded the WholeCare target in two different years had been de-listed. Dr. Francis missed his target in 1996. WholeCare has never de-listed a physician for quality of care reasons.

On April 1, 1997 Jerry visited Dr. Francis for a routine checkup. Dr. Francis gave Jerry his usual cursory examination and pronounced him "healthy as a horse," so long as he kept taking his blood pressure medicine. Jerry then asked Dr. Francis something that had been on his mind for awhile. For decades, Jerry had had about two dozen moles on his back. Four of them were raised up above his skin's surface, and Jerry's wife Betsy thought they were ugly. Jerry asked Dr. Francis if he would take them off. Dr. Francis said he'd be happy to snip them out (he would do almost anything for money) but Jerry would have to pay for the service out of his own pocket. The reason: WholeCare doesn't cover care that is not reasonably necessary for the diagnosis or treatment of illness or injury, or that is not intended to improve the functioning of a malformed body part. These moles, said Dr. Francis, were perfectly ordinary, and no threat to Jerry's health. They were not suspicious in appearance. Dr. Francis asked Jerry if they ever bled or itched. Jerry said they did not. What Jerry didn't mention, and Dr. Francis didn't ask about, was that one of the four moles had increased in size over the last six months.

Jerry didn't have much money to spare, but he wanted to please his wife, so he agreed to pay out of his own pocket to have the moles removed. Dr. Francis performed the simple surgery two weeks later. After finishing the minor operation, Dr. Francis asked Jerry whether Jerry wanted the moles sent to a pathologist for an examination of possible malignancy. "Back in med school they told us to have them all looked at," Francis said, "but I've never really seen the point in cases like this. Sure, it's true that 40-50% of malignant melanomas arise from pigmented moles. And maybe a quarter of those melanomas are fatal -- it's a kind of skin cancer, you know. But if the mole isn't already painful or itchy, if it's not suspicious in appearance, the chance of its being malignant is really small. No doctor would think of removing every mole on a patient's body just as a preventive measure, and nobody routinely biopsies moles removed just for aesthetic reasons. There are only about 11,000 cases of malignant melanoma from moles each year in the U.S., and they're usually easy to spot. But it's up to you. Pathology runs around \$100 per mole, so that would be \$400. Nice work if you can get it." Jerry decided he had better uses for his money.

After a summer beach vacation, Jerry noticed that another small mole had appeared right next to where one of the others had been removed. This one grew very slowly but caused no discomfort, so Jerry didn't worry about it. But in November 1997 his wife Betsy said, "Now you've got another one of those ugly moles. You ought to go back and have that young doctor look at it." Jerry phoned Dr. Francis's office on Nov. 30, 1997 and asked for an appointment to have the new mole checked. The receptionist checked with Dr. Francis, and reported that the doctor's schedule was booked. (What she didn't mention was that his practice was booming, he had a vacation planned, and he never liked this type of dermatological work anyway.) If there was an emergency, or if it was a medical problem that was covered by his WholeCare plan, she would try to work Jerry in, but otherwise he should go to a dermatologist. Jerry protested that Dr. Francis needed to finish the job he had started, because one of the moles had grown back. But the receptionist said "Sorry, we can't fit you in."

Jerry called up WholeCare on Dec. 18, 1997, and asked how to make an appointment with a dermatologist. Mike Moore, a WholeCare customer service representative, told him he needed to get a referral first from his primary care physician, and anyway, all the dermatologists in the WholeCare plan were probably booked up until well after the New Year. Discouraged and distracted by other problems in his life, Jerry did nothing until November 1999. By that time, the new mole had gotten large and ugly, and one day it bled onto his shirt. Jerry panicked, and (unshaven and dressed in old clothes) drove to the emergency room of City Hospital, which the WholeCare plan insisted that he use. He waited for two hours until a harried nurse, Harry Hearse, finally got to him. Jerry showed him the mole and said he wanted to see a doctor. "What are you doing here with this kind of trivial problem?" Harry said angrily. "We've got two hundred patients waiting out there with gunshot wounds and smashed faces and you don't want to know what all. A hospital emergency room is not a free medical clinic. Go home." Jerry, easily discouraged, left.

Fed up with WholeCare, the next day (Dec. 19, 1999) Jerry went to see Dr. Deedee Derm, a dermatologist in private practice not on WholeCare's list of plan-approved specialists. Dr. Derm saw immediately that the mole might be cancerous. She excised it and wide margins around it and cut pretty deeply, leaving a large scar. She sent it to a pathologist, who reported back a week later

that it was indeed malignant. By cutting the mole out, along with the nearby skin, Dr. Derm might have cured Jerry completely, but it was too early to tell. Whether the cancer had spread to surrounding tissue or to other organ systems was unclear. If it had reached other parts of the skin, one or two more simple surgeries would be required. If it had reached his lymphatic system, Jerry's future was clouded.

Jerry got this disturbing news just after a heated conversation with WholeCare representative Mike Moore. Moore had told him that WholeCare would not pay for his visit to Dr. Derm or the lab work connected with it, since Dr. Derm was an out-of-plan specialist. "You should have gone first to your primary care physician and gotten a referral to an in-plan dermatologist," Moore told Jerry. Jerry tried to tell him about his unsatisfactory experience with Dr. Francis, but Moore said there was nothing he could do.

Jerry has come to your firm for advice. He is angry, anxious, and frustrated. He is not sure what, if anything, he can do to obtain reimbursement for his costs, to obtain compensation for what he sees as bad medical care, and to punish those he thinks have wronged him. Tiger Thomas, the partner to whom Jerry talked, is a litigator unacquainted with most of the details of health law. Thomas wants a memo from you within 24 hours on how to advise Jerry.

In the memo, please explore the various possible avenues of redress available to Jerry, the difficulties of each one, and the prospects for success. To the extent that state law is applicable, the law of Arkansas governs the case.